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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES G. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1978. A petition for rehearing was denied on January 9, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to March 1, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's pre-trial request for the appointment of an investigator under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1).

STATUTE INVOLVED

18 U.S.C. 3006A(e)(1) provides:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, and on three counts of inducing persons to travel in interstate commerce in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314. Petitioner was sentenced to 30 months' imprisonment and five years' probation. The court of appeals affirmed (Pet. App. 1a-3a).

1. The evidence at trial, the sufficiency of which petitioner does not challenge, showed that petitioner and an agent whom he had recruited obtained cash performance bonds from construction contractors in the United States by falsely representing that they had entered into contracts for the erection of pre-fabricated housing with various South African building manufacturers and the governments of Egypt, Sudan, Nigeria and Saudi Arabia, and that such bonds were required by the contracts. By means of these representations,

petitioner obtained approximately $235,000 in cash, which he converted to his personal use. More than $150,000 was deposited in accounts in petitioner's name at a bank in Zurich, Switzerland. None of this money went to the foreign governments with which petitioner purported to have contracted. Petitioner presented no evidence in his defense.

2. Petitioner was indicted on November 8, 1977, in the United States District Court for the Western District of Washington. Through retained counsel in Washington, petitioner moved for a change of venue to the Southern District of New York on the ground, *inter alia*, that for medical reasons it was undesirable for him to be absent from the New York area, where his doctor was located, for more than a week at a time. The motion was granted and the case was transferred to the Southern District of New York on December 22, 1977.

On January 12, 1978, petitioner failed to appear for his scheduled arraignment in New York, and the court issued a bench warrant for his arrest, but stayed its execution until January 23, 1978. On January 23 petitioner again failed to appear in court, and John Leonard, an attorney who purported to enter a "special appearance" on petitioner's behalf, asked the court to stay execution of the warrant. Leonard informed the court that he had been asked to appear by petitioner's wife, that he had been in telephone communication with petitioner for the past week, that petitioner was in Europe gathering evidence for his defense and that petitioner would be back in the country by February 6 and would seek no further continuance from the court (January 23, 1978 Tr. 2, 4, 6-7, 14-20). When the court noted that petitioner's

absence from the country was in violation of bail conditions imposed on petitioner (*id.* at 15-17), counsel stated that petitioner was aware of the April 17 trial date and would not ask for a postponement (*id.* at 17).

On February 6, petitioner appeared in court, and, over the government's objection that petitioner could afford retained counsel, the court appointed an attorney to represent him. On February 24, 1978, at petitioner's request and again over the government's objection, the court appointed a second attorney to represent him at public expense.

On March 1, 1978, contrary to counsel's earlier representation that petitioner would not seek to postpone the scheduled trial date, petitioner moved for a continuance of the trial, permission to travel abroad, and the appointment of an investigator under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1). In an affidavit submitted in support of the motion, one of petitioner's attorneys stated (C.A. App. 33a) that "preparation of this defense requires an immense amount of work, both on the law pertinent to the issues and the facts of the case." The attorney also asserted that an "authorized investigator, working with the defense * * * could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was committed by the defendant" (*id.* at 34a). In the same affidavit, however, counsel asserted (*id.* at 37a-38a) that petitioner should be permitted to travel abroad because "an investigator would be unable to secure some of the required information."

The district court denied the motion, concluding that "[d]efendant has not made an adequate showing of the

necessity for an investigator. The court has already approved the appointment of two trial counsel for the defendant pursuant to the Criminal Justice Act. There is no reason why the necessary trial preparation cannot be achieved by counsel" (C.A. App. 47a). The court also noted that four and a half months was ample time within which to prepare for trial and that petitioner had been abroad for a month in January gathering evidence for trial (*ibid.*).[1]

The court of appeals affirmed petitioner's conviction and rejected, *inter alia*, his claim that the district court should have appointed an investigator. The court stated (Pet. App. 2a; citations omitted): "In light of the defendant's failure to set forth the reasons for the need of an investigator's services and its relevance to an adequate defense, * * * and in the absence of a showing that his attorneys could not undertake the tasks to which the investigator was to be assigned, * * * Judge Metzner properly exercised his discretion in refusing to

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[1]Petitioner recently filed a motion in the district court for reduction of sentence under Fed. R. Crim. P. 35 supported by an affidavit by a New York attorney representing petitioner. The affidavit asserts, on the basis of what petitioner has now informed the affiant, that petitioner was not overseas gathering evidence during the month of January, 1978, but instead was overseas during that period on an unofficial diplomatic mission "relative to a highly secret matter that involved the national security of the United States" (Aff. 6). None of these allegations were before the district court when it ruled on petitioner's pretrial motions (or, as the affidavit admits (Aff. 10), before the court at sentencing). What was before the court were the repeated representations of Leonard that he had been in telephone communication with petitioner, that petitioner was overseas gathering evidence for his defense, and that petitioner was unaware, before he left, "of how many cartons of documents he would have to go through to gather the evidence to support his position" (January 23, 1978 Tr. 16).

appoint such an investigator under the Criminal Justice Act, 18 U.S.C. 3006A(e)(1) (citations omitted)."

ARGUMENT

Petitioner's sole claim is that the district court abused its discretion in failing to grant his motion for the appointment of an investigator under 18 U.S.C. 3006A(e)(1) (Pet 8-15). The court of appeals correctly rejected that claim.

18 U.S.C. 3006A(e)(1) authorizes courts to provide "investigative, expert, or other [non-legal] services" only when there is a showing that the services are "necessary for an adequate defense." The courts that have considered this statute have uniformly held that bare assertions of general need for the services of an investigator are insufficient to require the trial judge to grant the motion. See, *e.g.*, *United States* v. *Davis*, 582 F. 2d 947 (5th Cir. 1978); *United States* v. *Harris*, 542 F. 2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Kasto*, 584 F. 2d 268, 273 (8th Cir. 1978); *Mason* v. *Arizona*, 504 F. 2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975); *United States* v. *Mundt*, 508 F. 2d 904, 908 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975). As the Fifth Circuit recently held, "[a] defendant must show specifically the reasons why the services are necessary." *United States* v. *Davis, supra*, 582 F. 2d at 951.

In this case, petitioner's request was supported only by the bare assertions of counsel that preparation of the defense required the services of an investigator "who could travel, interview witnesses, review and locate other documents, and otherwise substantiate the defense position that no criminal fraud was committed by the defendant" (C.A. App. 33a). However, the

motion and supporting affidavit failed to identify any such witnesses or documents and provided no reason why such activities could not be performed by one of the two attorneys appointed to represent petitioner. See *United States* v. *Harris*, *supra*, 542 F. 2d at 1315-1316. The statute does not require the district court to accept at face value such general and unsupported assertions of need, and it was thus well within the court's discretion to deny the motion on the grounds that counsel were capable of preparing adequately for trial, that four and a half months was sufficient time to locate documents and witnesses, and that petitioner himself had already been abroad for a month gathering evidence. In any event, the correctness of the trial judge's decision turns solely upon the application of settled principles to the particular facts of this case and does not warrant this Court's review.

Petitioner also errs in contending (Pet. 10-11) that the standard applied by the courts below conflicts with the standard established by other circuits. The cases cited by petitioner (Pet. 10-11), which all involved requests for the appointment of psychiatric experts, suggest that an expert should be appointed under Section 3006A(e)(1) "in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States* v. *Bass*, 477 F. 2d 723, 725 (9th Cir. 1973).[2] Even assuming that those courts would apply the same standard to requests for the appointment of an ordinary investigator (see *United States* v. *Harris*, *supra*, 542 U.S. at 1315), that

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[2]See also, *Brinkley* v. *United States*, 498 F. 2d 505 (8th Cir. 1974; *United States* v. *Theriault*, 440 F. 2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), cert. denied, 411 U.S. 984 (1973).

standard is not inconsistent with the ruling of the courts below that a defendant must still make some particularized showing that the investigator or expert is necessary to prepare an adequate defense. Indeed, the cases cited by petitioner all relied on specific facts that demonstrated the need for the requested expert.[3] Furthermore, one would assume that a lawyer for a client who has the financial means to pay for investigative services would be able specifically to identify to the investigator the witnesses and matters he would like him to investigate and their relevance to the case, which the affidavit of applicant's counsel failed to do.[4] In sum, petitioner's showing in the district court would not have entitled him to the appointment of an investigator under Section

[3]Petitioner's suggestion that the decisions in *Bass* and *Theriault* indicate that the Ninth and Fifth Circuits would have reached a different result from that of the Second Circuit is also belied by the subsequent decisions in *Mason* and *Davis*. In cases where the defendant has made a specific showing of need for the services of an expert, the Second Circuit has granted relief and has cited *Theriault* and *Bass* with approval. See *United States* v. *Durant*, 545 F. 2d 823, 827 (2d Cir. 1976).

[4]Again, the district court is not required to accept the bare assertion of an applicant or his counsel that they would hire an investigator if they had the means to do so, and the cases cited by petitioner do not suggest otherwise. Nor do those cases suggest that a court is required to appoint an investigator to assist an indigent merely because a defendant with unlimited resources might hire an investigator (or a team of investigators) out of an abundance of caution. Cf. *Ross* v. *Moffitt*, 417 U.S. 600, 616 (1974). The Report of the Committee to Implement the Criminal Justice Act recommended that "the allowances of petitions for investigative services be strictly limited, to the extent possible, to those charges necessary in the strictest sense of the word." 36 F.R.D. 277, 290 (1965).

3006A(e)(1) under any of the standards petitioner suggests are followed in other circuits.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner's further suggestion (Pet. 12) that the proceedings here were contrary to the provision of Section 3006A(e)(1) that requests for investigative services be heard *ex parte* is without merit. Petitioner's motion, with supporting affidavit, was served on the government, and the prosecutor replied with a memorandum in opposition. Petitioner did not then specify his need for an investigator or request an *ex parte* hearing in which he could specify such a need. Thus, the cases relied on by petitioner (*United States* v. *Sutton*, 464 F. 2d 552 (5th Cir. 1972); *Marshall* v. *United States*, 423 F. 2d 1315 (10th Cir. 1970), are inapposite. Both involve instances where the prosecutor remained in the courtroom when an *ex parte* hearing was being held, thus forcing the defendant to reveal his defense strategy to the government or lessen the chance of obtaining the services of an investigator. Here, of course, petitioner revealed his strategy, or lack thereof, by sending his motion and affidavit to the government.

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